

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

DEC 28 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0133
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
CHRISTOPHER DENNIS BIENIECKI, JR.,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094179001

Honorable José Robles, Judge Pro Tempore

AFFIRMED

Robert J. Hirsh, Pima County Public Defender
By Kristine Maish

Tucson
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 Christopher Bieniecki, Jr. was convicted after a jury trial held in his absence of two counts of sale of a narcotic drug and one count of possession of drug paraphernalia. The trial court sentenced him to enhanced, mitigated and presumptive, concurrent prison terms, the longest of which were 10.5 years. Counsel has filed a brief citing *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), in which she avows she has reviewed the record but has found no “arguably meritorious issue to raise on appeal” and requests that we search the record for fundamental error. Bieniecki has not filed a supplemental brief.

¶2 Counsel nonetheless identifies and argues what she describes as “arguably meritorious issue[s],” suggesting the uncorroborated identification testimony of the investigating officer was insufficient to support Bieniecki’s convictions and the “requirement that the defendant assert at sentencing that he was not the person at the crime scene is unconstitutional.” We address these issues below.¹

¶3 Viewed in the light most favorable to sustaining Bieniecki’s convictions, we find there was sufficient evidence to support the jury’s verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), and we conclude his sentences were within the prescribed statutory range and were imposed lawfully, *see* A.R.S. §§ 13-703(C), (J), 13-3408(A)(7), (B)(7), 13-3415(B). On two occasions in February 2009,

¹Despite counsel’s avowal that the brief filed here complies with *Clark*, that case directs counsel to file an *Anders* brief only if she “determines that a defendant’s case discloses no arguable issues for appeal,” 196 Ariz. 530, ¶ 30, 2 P.3d at 96. Counsel identifies issues here that she characterizes as “arguable.” We encourage her to comply with applicable authority in the future.

Bieniecki sold heroin packaged in plastic baggies to an undercover police officer. *See* §§ 13-3408(A)(7), 13-3415(B). Bieniecki argues the undercover officer’s identification was insufficient because it was not corroborated by other evidence. This argument is meritless. At trial, the undercover officer identified Bieniecki from an authenticated booking photograph as the man who had sold him heroin. That evidence plainly meets any minimum standards of reliability required here.² *See State v. Nordstrom*, 200 Ariz. 229, ¶ 26, 25 P.3d 717, 729-30 (2001) (identification may violate due process “when evidence lacking in foundation reaches the jury under circumstances that do not afford a defendant an opportunity to point out its weaknesses”). Bieniecki cites no authority, and we find none, suggesting that, in order to support a conviction, that identification must be corroborated by other evidence.

¶4 Bieniecki also asserts, as we understand his argument, that the state was somehow relieved of its burden to prove his identity because, pursuant to *State v. Hall*, 136 Ariz. 219, 665 P.2d 101 (App. 1983), and *State v. Rocha-Rocha*, 188 Ariz. 292, 935 P.2d 870 (App. 1996), a defendant who was tried in absentia must, to raise a claim of

²Bieniecki appears to argue that the undercover officer’s identification of him based on another photograph was obtained under unduly suggestive circumstances and was not otherwise reliable, reciting the analysis outlined by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972). We question whether that analysis is appropriate. Although the witness is a police officer, Bieniecki identifies no suggestive state action related to the officer’s identification. *See Nordstrom*, 200 Ariz. 229, ¶¶ 23-24, 25 P.3d at 729 (*Biggers* analysis unnecessary in absence of state action). In any event, even assuming there was some suggestive state action, the officer’s identification was sufficiently reliable to be presented to the jury; the officer met with Bieniecki twice in broad daylight and identified him from a photograph one day after their first encounter. *See Biggers*, 409 U.S. at 199-200 (listing reliability factors).

mistaken identity at sentencing, assert that he or she was not the person who was arrested for the crime or crimes charged. Even if this argument had some theoretical merit, Bieniecki essentially acknowledged at sentencing that he was the man originally arrested by apologizing for absconding from his trial.

¶5 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error. Having found none, we affirm Bieniecki's convictions and sentences.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge